CIPA DECISION UPDATE **Prepared (for the ACLU) by: Theresa Chmara**
Jenner & Block

KEY POINTS

> The Court has entered a permanent order directed to the FCC and LSTA holding that they may not withhold funds on the ground that a public library has failed to install a filter on every computer.

> This decision does ~ apply to school libraries. The decision has useful findings about the ineffectiveness of filters that would be helpful to any school or school library resisting filters.

> Public libraries are required to certify compliance with NCIPA. NCIPA requires the library to have an Internet Safety Policy in place with respect to minors' use of the Internet. The policy must address (i) access by minors to inappropriate matter on the Internet and World Wide Web; (ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (iii) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (v) measures designed to restrict minors' access to materials harmful to minors. Prior to adopting the Internet Safety Policy the public library must hold at least one public hearing or meeting at which members of the community can have input on the policy.

LEGAL CONCLUSIONS

> Compliance with CIPA will require public libraries to block access to constitutionally protected speech. The Court held that "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies' own blocking criteria." Slip Opinion, at 107.

> The public library is a limited public forum for the receipt of information and creates a limited public forum when it offers Internet access. The Court held that "[w]e is satisfied that when the government provides Internet access in a public library, it has created a designated public forum." Slip Opinion, at 114.

> The government has a compelling interest in preventing access to illegal speech. The Court held that "[t]he government's interest in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors, is well-established." Slip Opinion, at 143.

> The government may, in certain cases, have an interest in protecting patrons from exposure to illegal speech accessed by other patrons. The Court held that "[u]nder certain circumstances. … a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive." Slip Opinion, at 149. The Court reiterated, however, "[to] the extent that speech has serious literary, artistic, political, or scientific value, and therefore is not obscene under the *Miller* test of obscenity, the state's interest in shielding unwilling viewers from such speech is tenuous." Slip Opinion, at 148.

> The government may not justify Internet filtering as a way of minimizing criminal or inappropriate conduct. The Court held that "{a]side from a public library's interest in preventing patrons from using the library's Internet terminals to receive obscenity or child pornography, which constitutes criminal conduct, we are constrained to reject any compelling state interest in regulating patrons' conduct as a justification for content-based restrictions on patrons' Internet access." Slip Opinion, at *150.* The Court held also that "~t]he proper method for a library to deter unlawful or inappropriate patron conduct, such as harassment or assault of other patrons, is to impose sanctions on such conduct, such as either removing the patron from the library, revoking the patron's library privileges, or, in the appropriate case, calling the police." Slip Opinion, at 151.

> Filtering is not narrowly tailored to address the government's compelling interest in preventing the dissemination of illegal speech. The Court held that "[g]iven the substantial amount of constitutionally protected speech blocked by the filters studied, we conclude that use of such filters is not narrowly tailored with respect to the government's interest in preventing the dissemination of obscenity, child pornography and material harmful to minors." Slip Opinion, at *153.* The Court found that filtering companies could not utilize human review effectively given the vast size of the Web and "credit the testimony of plaintiffs' expert witness, Dr. Geoffrey Nunberg, that no software exists that can automatically distinguish visual depictions that are obscene, child pornography, or harmful to minors." Slip Opinion, at *153.* The Court concluded, moreover, that the government "fail[ed] to produce evidence of any filtering technology that avoids overblocking a substantial amount of protected speech." Slip Opinion, at *155.*

> Filtering is not narrowly tailored to address the government's compelling interest in preventing patrons from being unwillingly exposed to offensive, sexually explicit material. The Court held that "[a]lthough we have found large amounts of overblocking, even if only a small percentage of sites blocked are erroneously blocked, either with respect to the state's interest in preventing adults from viewing material that is harmful to minors, or with respect to the state's interest in preventing library patrons generally from being unwillingly exposed to offensive, sexually explicit material, this imprecision is fatal under the First Amendment." Slip Opinion, at 159. The Court cautioned that "[w]here the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer." Slip Opinion, at 160.

> Less restrictive alternatives exist that serve the government's interest in preventing the dissemination of obscenity and child pornography. The Court listed a number of less restrictive alternatives that could be utilized by a public library to prevent the dissemination of obscenity and child pornography: (1) adoption of an Internet use policy and requirement that patrons must sign an agreement to abide by the policy; and (2) monitoring of library patron adherence to policies through observation and review of Internet logs. The Court noted that "[a]lthough these methods of detecting use of library computers to access illegal content are not perfect, and a library, out of respect for patrons' privacy, may choose not to adopt such policies, the government has failed to show that such methods are substantially less effective at preventing patrons from accessing obscenity and child pornography than software filters." Slip Opinion, at 164.

> Less restrictive alternatives exist that serve the government's interest in preventing the dissemination of material harmful to minors. The Court noted that a variety of less restrictive alternatives exist that public libraries can use to prevent the dissemination of

material to minors that may be deemed harmful to them: (1) a tap-on-the shoulder policy that requests that a minor refrain from viewing material that is harmful; (2) requiring minors to use terminals in open areas of the children's room where librarians are present; (3) requiring minors to use blocking software when unaccompanied by a parent; (4) requiring parental consent for unfiltered access. Slip Opinion, at 166.

> Less restrictive alternatives exist that serve the government's interest in preventing patrons from being exposed to offensive, sexually explicit material. The Court listed several less restrictive alternatives that would prevent patrons from accidentally accessing content the patron may deem offensive, such as (1) training and guidance on how to use the Internet; and (2) optional filtering software for adults. The Court also listed several less restrictive options that would prevent patrons from seeing content accessed by other patrons, such as: (1) segregation of filtered and unfiltered terminals; and (2) privacy screens and recessed monitors. Slip Opinion, at 168-170.

> **The disabling provisions of CIPA do not cure the unconstitutional defects of the statute.** The Court held that "the requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." Slip Opinion, at 174. The Court held that "library patrons will be reluctant and hence unlikely to ask permission to access, for example, erroneously blocked Web sites containing information about sexually transmitted diseases, sexual identity, certain medical conditions, and a variety of other topics." Slip Opinion, at 176. The Court also held that the ability to design a system for anonymous requests to disable did not solve the problem of overblocking because the requirement still imposes a significant burden on the library patrons. The Court held that "delays are inevitable in libraries with branches that lack the staff necessary immediately to review patron unblocking requests" and that "a patron's time spent requesting access to an erroneously blocked Web site and checking to determine whether access was eventually granted is likely to exceed the amount of time the patron would have actually spent viewing the site, had the site not been erroneously blocked." Slip Opinion, at 178.

FACTUAL FINDINGS

> "Public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." Slip Opinion, at 134.

> "Approximately 10% of the Americans who use the Internet access it at public libraries." Slip Opinion, at 4

> "[A]proximately 95% of all public libraries in the United States provide public access to the Internet."

> "Public libraries provide information not only for educational purposes, but also for recreational, professional and other purposes." Slip Opinion, at 37.

> "The mission of public librarians is to provide their patrons with a wide array of information, and they surely do so." Slip Opinion, at 37.

> "In general, professional standards guide public librarians to build, develop, and create collections that have certain characteristics, such as balance in its coverage and requisite and appropriate quality. To this end, the goal of library collections is not universal coverage, but rather to find those materials that would be of the greatest direct benefit or interest to the community." Slip Opinion, at 38.

> "[N]o category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors." Slip Opinion, at 56.

> "[T]here is no judicial involvement in the creation of filtering software companies' category definitions and no judicial determination is made before these companies categorize a Web page or site." Slip Opinion, at 56.

> "Filtering companies, given their limited resources, do not attempt to index or classify all of the billions of pages that exist on the Web." Slip Opinion, at 59.

> "The filtering software companies involved here have limited staff, of between eight and a few dozen people, available for hand reviewing Web Pages.. . . Given the speed at which human reviewers must work to keep up with even a fraction of the approximately 1.5 million pages added to the publicly index-able Web each day, human error is inevitable. Errors are likely to result from boredom or lack of attentiveness, overzealousness, or a desire to 'err on the side of caution' by screening out material that might be offensive to some customers, even if it does not fit within any of the company's category definitions. None of the filtering companies trains its reviewers in the legal definitions concerning what is obscene, child pornography, or harmful to minors, and none instructs reviewers to take community standards into account when making categorization decisions." Slip Opinion, at 65.

> The Court noted numerous specific examples of web sites that were erroneously blocked by one of the four tested filtering programs, including religious sites, political sites, medical sites, and sports sites. Slip Opinion, at 91- 94.

> "While most libraries include in their physical collection copies of volumes such as *The Joy of Sex* and *The Joy of Gay Sex,* which contains quite explicit photographs and descriptions, filtering software blocks large quantities of other, comparable information about health and sexuality that adults and teenagers seek on the Web." Slip Opinion, at 6.

> "[C]ommercially- available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment." Slip Opinion, at 95.

> Filters are "blunt instruments that not only 'underblock,' i.e., fail to block access to substantial amounts of content that the library boards wish to exclude, but also, central to this litigation, 'overblock,' i.e., block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected." Slip Opinion, at *5*.

> "At least tens of thousands of pages of the index-able Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions." Slip Opinion, at 98. Moreover, "{t]he number of overblocked sites is of course much higher with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as 'sex' and 'nudity,' encompass vast amounts of Web pages that are neither child pornography nor obscene." Slip Opinion, at 98.

> "There are many reasons why filtering software suffers from extensive over- and underblocking, which we will explain below in greater detail. They center on the limitations on filtering companies' ability to (1) accurately collect Web pages that potentially fall into a blocked category (e.g., pornography); (2) review and categorize Web pages that they have collected; and (3) engage in regular re-review of Web pages that they have previously reviewed." Slip Opinion, at 9-10.

> "No presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors." Slip Opinion, at 98.

> "[F]iltering companies' failure to engage in regular re-review of Web pages that they have already categorized (or that they have determined do not fall into any category) results in a substantial amount of over- and underblocking." Slip Opinion, at 97.

> "[W]e find that it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks or overblocks a substantial amount of speech." Slip Opinion, at 10.